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CITATIONS

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Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 81

CLARENCE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 13–19) is reported at 418 F. 2d 159.

JURISDICTION

The judgment of the court of appeals (A. 20) was entered on October 17, 1969. A petition for rehearing *en banc* was denied on December 24, 1969 (A. 21). The petition for a writ of certiorari, was filed on January 26, 1970, after the time prescribed by Rule 22–2 of the Rules of this Court. On March 23, 1970, the petition for a writ of certiorari was granted (A. 22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search was reasonably incident to a lawful arrest under the standards which governed prior to the decision in *Chimel* v. *California*, 395 U.S. 752.

2. Whether the new rule announced in *Chimel* should be retroactively applied to cases pending on appeal at the time it was decided.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of concealing illegally imported heroin in violation of 21 U.S.C. 174 (IR 1, 61; TTP 188, 200).[1] On February 26, 1968, he was sentenced to imprisonment for ten years (IR 68). On appeal his conviction was affirmed.[2]

The evidence, adduced at the hearing on the motion to suppress, which was denied (TMS 313), and at the trial, showed that the government had reasonable grounds to believe that petitioner had been a party to an illegal narcotics sale on March 9, 1967 (IR 6–15, 21; TMS 7–8, 51–53, 69). Federal, state and city police officers of Phoenix, Arizona, continued to

[1] For the sake of uniformity, we use the same abbreviations designated by petitioner, *i.e.*, "TTP" for the transcript of the trial proceedings, and "TMS" for the transcript of the motion to suppress. We are lodging with the Clerk copies of these two transcripts. "IR" refers to volume one of the record in the court below, a copy of which is on file with the Clerk of this Court.

[2] The court below found that the evidence of possession was insufficient as to co-defendant Arlene Jackson, who was tried jointly with petitioner, and reversed her conviction (A. 18–19).

investigate petitioner and co-defendant Jackson after March 9 to determine the source of supply of the narcotics (TMS 12, 13, 16, 17, 19, 20, 253). A check of the local utility company's records showed that petitioner and Mrs. Jackson lived at 1402 East Granada in Phoenix (TMS) 40). On occasions, law officers had observed petitioner park a 1959 Chevrolet and a 1967 Cadillac in front of this residence, and had seen petitioner and Mrs. Jackson enter and leave (TTP 14–15, 67–68, 82). One officer testified that he had observed the East Granada premises for several weeks prior to March 31, 1967, and had not seen anyone other than petitioner or Mrs. Jackson entering or leaving (TTP 41).

At 4:30 p.m. on March 30, after the officers had concluded that further investigation to locate the source of supply would not be fruitful, they obtained a warrant for petitioner's arrest for the illegal sale of heroin that had occurred on March 9 (TMS 21, 24). At 8:00 p.m. that evening, federal, state and local officers had a meeting, at which they were instructed to go to different locations to find petitioner and to arrest him pursuant to the warrant (TMS 28, 84, 135, 141, 201–202, 244–245, 303). No search warrant had been issued for the East Granada premises (TMS 49, 101, 214, 254). Four officers testified that at the meeting there was no discussion about plans to search the East Granada premises as incident to petitioner's arrest (TMS 29, 91, 203–204, 248–249). One officer testified that a search of these premises pursuant to a search warrant was discussed at the meeting (TMS 281–282).

Starting at about 9:00 p.m. (TMS 29–30, 92, 187), the officers went to various locations known to be frequented by petitioner, including his home on East Granada and his business address in downtown Phoenix (TMS 30, 32–33, 92–94, 245–247). While the officers were looking for petitioner, he was, according to his own testimony, constantly on the move from 5:50 p.m., when he left his East Granada residence, until his return there at 11:40 p.m. During that time he had gone to his business address, to various cocktail lounges and to a dog track (TMS 287–290, 293, 295–297). When petitioner drove up to his home in his Cadillac, it was the first time that day that the officers had seen him (TMS 23, 67, 136, 184, 221, 256). Agent Watson notified the other officers by police radio that petitioner had arrived home and the officers met at the East Granada address (TMS 59, 94).

At 12:10 a.m., agent Watson knocked on the front door and stated that he was a federal narcotics agent with a warrant for petitioner's arrest (TMS 34–35). After Mrs. Jackson opened the door, Watson entered and arrested petitioner in the living room (TMS 36). In the meantime other officers entered the home through various entrances (TMS 37, 59). Petitioner and Mrs. Jackson were the only persons on the premises other than the officers (TTP 13).

When agent Watson arrested petitioner, the latter was sitting on a sofa in the living room, eating a meal and watching television. He was dressed in his underwear and a robe, and wore slippers (TTP 12–13, 69). For approximately two hours following the arrest, the officers conducted a search for heroin and other evi-

dence of the crime (TMS 38, 105–106, 192, 196, 214–215, 252–253, 255; TTP 21). The search resulted in the seizure of cocaine, marihuana, $500 in government funds which had been used to purchase narcotics, and several loaded revolvers and rifles (TMS 45–46, 158). On a shelf in the closet in the northeast bedroom the officers seized a metal container which had in it five rubber containers of heroin. (TTP 62–63, 76, 114). This was the only closet in the bedroom; it also contained men's and women's clothing, one or two purses, men's hats and numerous shoes (TTP 65, 76). The room contained a double bed and a dresser in which there were men's and women's underclothing, some jewelry and socks (TTP 22–23, 65). Before leaving with the arresting officers, petitioner dressed in this bedroom, taking clothing from the dresser and closet (TTP 21, 22, 33, 69).

While the case was pending in the court of appeals, this Court decided *Chimel* v. *California,* 395 U.S. 752, *Shipley* v. *California,* 395 U.S. 818, and *Von Cleef* v. *New Jersey,* 395 U.S. 814. Thereafter, the court of appeals ordered the case resubmitted, specifically directing the parties to file supplementary briefs discussing the effect, if any, of those decisions on the present case. Subsequently, relying on previous decisions of this Court, the court of appeals held that *Chimel* should not be given retroactive effect. The court went on to uphold the validity of the search under pre-*Chimel* law.[3]

[3] Although in his petition for a writ of certiorari petitioner raised the sufficiency of the evidence as an issue presented, he apparently has abandoned it at this juncture.

SUMMARY OF ARGUMENT

I. Petitioner contends that the arresting officers delayed arresting him until his arrival at home so that they could conduct a warrantless search of his residence. After hearing extensive testimony concerning the officers' attempts to locate petitioner at numerous places in order to arrest him, the district court found that the arrest of petitioner at his home was not the product of a calculated plan, but was merely due to the fact that petitioner was constantly on the move the night of his arrest. The court of appeals correctly found that there was "ample evidence" to sustain this finding.

II. The rule announced in *Chimel* v. *California,* 395 U.S. 752, should not be held applicable to prior trials where reliable evidence had been obtained in conformity with the law as it then existed. The question of the retroactivity of *Chimel* is now before the court in *United States* v. *Elkanich,* No. 82 this Term, set for argument immediately preceding this case. Our views on the question of retroactivity of *Chimel* generally are set forth in our brief in *Elkanich,* to which we respectfully refer the Court.

Unlike *Elkanich,* which involves a collateral attack on a conviction pursuant to a proceeding under 28 U.S.C. 2255, the instant case arises on direct review. Recent decisions of this Court have recognized that, where it has been determined that a new constitutional rule is to be applied only prospectively, there is no necessity to differentiate between past cases in which the convictions were final on the date of the new

decision and cases in which appellate review was still in progress. In *Stovall* v. *Denno,* 388 U.S. 293, 300–301, the Court reasoned that the same factors which demonstrate the inappropriateness of retroactivity in general "make that distinction [between cases on collateral and direct review] unsupportable." The Court also pointed out that to distinguish between collateral and direct review would only increase the number of "chance beneficiaries" of a particular decision without in any way aiding the enforcement of Fourth Amendment rights. Two terms ago, in *Desist* v. *United States,* 394 U.S. 244, the court reaffirmed this principle in holding that *Katz* v. *United States,* 389 U.S. 347, would not be retroactively applied. *Katz,* like *Chimel,* arose in the context of the Fourth Amendment, where we believe that it is particularly appropriate to apply new decisions prospectively. Petitioner acknowledges that the instant case is indistinguishable from *Desist.* We submit that the principles stated in *Desist* should be reaffirmed.

ARGUMENT

I. THE ARREST OF PETITIONER AT HIS RESIDENCE WAS NOT A PRETEXT TO CONDUCT A SEARCH

Petitioner endeavored in the district court to show that the arresting officers delayed apprehending him until his arrival at home so that they could conduct a warrantless search of his residence. He failed to convince the courts below that this was so, however. The officer in charge and, with one exception, all other officers testified that once the arrest warrant was issued, they made a determined effort to locate and arrest him at numerous places other than his home.

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Their lack of success in this regard was not the product of a calculated plan, but was simply due to the fact that petitioner—as he himself testified—was constantly on the move on the night of the arrest (see TMS 287–290, 293, 295–297). Although petitioner has consistently contended that plans to search the residence were discussed at the meeting of the officers held immediately before they embarked on their search for petitioner, four officers in attendance at this meeting testified that no such plans were discussed (see TMS 29, 91, 203–204, 248–249). The only officer who testified to the contrary was also of the erroneous view that the officers were proceeding under a search warrant (TMS 281–282). The district judge, who recognized the discrepancies in the testimony, expressly declared that he had resolved them adversely to petitioner (TTP 124). The court of appeals found "ample evidence" to sustain this finding (A. 15).[4]

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[4] Petitioner charges that "[t]he stated reason for not obtaining a search warrant was that in the opinion of the arresting officers there was no probable cause for the issuance of such a warrant to search the premises at 1402 East Granada" (Pet. Br. 3). As authority for this allegation petitioner refers to the statement of one *local* officer which, when read in context, would be understood to mean that in the officer's own opinion *he* (or possibly the Phoenix police) did not have sufficient basis to obtain a search warrant (TMS 101). The answers to the immediately proceeding questions indicated that these questions and answers were aimed only at the knowledge of the officer and the local police, not that of the federal agents (TMS 101-102). The officer's statement cannot reasonably be understood to stand for the proposition that the federal authorities—who were the controlling figures in the investigation—felt they lacked adequate basis to obtain a search warrant. We note, moreover, that this officer testified that there was no previous

Nor was there any impropriety in the three-week delay between the March 9 transaction and the procurement of the warrant. As this court recently stated, "There is no constitutional right to be arrested" (*Hoffa* v. *United States,* 385 U.S. 293, 310). The delay here involved a reasonable investigative procedure aimed at discovery of the source of petitioner's heroin. It was only when the officer in charge determined that further surveillance would be futile that he procured a warrant for petitioner's arrest for the earlier sale (see TMS 12, 21). Thereafter, the officers exercised due diligence to effect execution of the warrant. On this record, their conduct is not suspect merely because they were able to locate petitioner only at his home (see *United States* v. *Weaver,* 384 F. 2d 879 (C.A. 4), certiorari denied, 390 U.S. 983).[5]

II. THE RESTRICTIVE RULE FIRST ANNOUNCED IN CHIMEL V. CALIFORNIA, 395 U.S. 752, SHOULD NOT BE HELD APPLICABLE TO PRIOR TRIALS WHERE RELIABLE EVIDENCE HAD BEEN OBTAINED AND INTRODUCED INTO EVIDENCE IN CONFORMITY WITH THE LAW AS IT THEN EXISTED.

On February 2, 1970, this Court granted certiorari in *United States* v. *Elkanich,* No. 82, this Term (396 U.S. 1057). This case has been set down for argument immediately following *Elkanich*. One of the issues there,

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plan to search petitioner's residence (TMS 91), but rather, that he "would have been arrested wherever we located him" (TMS 135).

[5] *United States* v. *James,* 378 F. 2d 88 (C.A. 6), relied on by petitioner, is inapposite, since there the officers met shortly prior to the arrest to plan petitioner's arrest at her apartment, made no attempt to execute the warrant elsewhere, and "descended en masse upon the apartment" (378 F. 2d at 90).

as here, is the retroactivity of this Court's decision in *Chimel* v. *California,* 395 U.S. 752. We respectfully refer the Court to our brief in *Elkanich,*[6] where our views on the question of retroactivity generally are elaborated at some length.[7] However, *Elkanich* involves a collateral attack on a conviction pursuant to a proceeding under 28 U.S.C. 2255, while this case comes before the Court on *direct* review of a conviction—a distinction we regard as without significance insofar as the retroactivity issue is concerned. Nonetheless, in view of this difference, it may be useful to articulate in summary fashion the reasons which support a holding of non-retroactivity here as well as in *Elkanich.*

Recent decisions of this Court have recognized that, where it has been determined that a new constitutional rule is to be applied only prospectively, there is no necessity to differentiate between past cases in which the convictions were final on the date of the new decision and cases in which appellate review was still in progress. In *Johnson* v. *New Jersey,* 384 U.S. 719, this Court first considered whether there is any reason to distinguish between direct and collateral attack in making determinations as to retroactivity or prospectivity. There the Court observed that previously, despite *Linkletter* v. *Walker,* 381 U.S. 618, where it had denied retroactivity to *Mapp* v. *Ohio,* 367 U.S. 643, *Mapp* had nevertheless been applied to

[6] We are sending a copy of our *Elkanich* brief to counsel for petitioner.

[7] See also the government's brief in *Desist* v. *United States,* No. 12, 1968 Term.

cases pending on direct review. A similar approach had been taken in *Tehan* v. *Shott,* 382 U.S. 406, with respect to the prospectivity of *Griffin* v. *California,* 380 U.S. 609. However, the Court announced in *Johnson* that (384 U.S. at 732):

> Our holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. * * *

It was emphasized that these prior applications had been made "without discussion" and before the Court had explicitly focused upon the issue (*ibid.*). See Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling,* 42 N.Y.U.L. Rev. 631, 644–646 (1967).[8] In *Johnson,* the Court concluded that there are "no jurisprudential or constitutional obstacles" to adopting a rule of total non-retroactivity (384 U.S. at 733). Accordingly, *Escobedo* v. *Illinois,* 378 U.S. 478, and *Miranda* v. *Arizona,* 384 U.S. 436, were held to be inapplicable to cases on collateral review and also to those which were on direct review at the time they were decided. *Escobedo* and *Miranda* were given "[p]rospective application only to trials begun after the [new] standards were announced" (384 U.S. at 732).

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[8] *Mapp* and *Griffin* both antedated the Court's decision in *Linkletter.*

When again confronted with the same issue i *Stovall* v. *Denno,* 388 U.S. 293, this Court reaffirme its view that for purposes of retroactivity "no di tinction is justified between convictions now final * * and convictions at various stages of trial and direc review" (388 U.S. at 300). There the court reasone that the same factors which demonstrate the inap propriateness of retroactivity in general "make tha distinction [between cases on collateral and direc review] unsupportable" (*id.* at 300–301). Similarly, i *DeStefano* v. *Woods,* 392 U.S. 631, the Court, relyin on *Stovall,* explicitly stated that it perceived "no basi for a distinction between convictions that have be come final and cases at various stages of trial and appeal" (*id.* at 635, n. 2).

Only two Terms ago, in *Desist* v. *United States,* 39 U.S. 244, which involved the retroactivity of *Katz* v *United States,* 389 U.S. 347, the Court rejected the argument that cases which come before it on direct review should be afforded different treatment insofar as partial or total non-retroactivity is concerned. There the Court declared that the same reasons which called for prospective application of *Katz* "also undercut any distinction between final convictions and those still pending on review" (394 U.S. at 253).

Like *Desist* and *Katz,* both *Chimel* and the instant case arise in the Fourth Amendment context. It is peculiarly appropriate, we submit, to apply a rule of complete prospectivity to Fourth Amendment cases. This Court recognized as long ago as in *Elkins* v. *United States,* 364 U.S. 206, that the exclusionary rule in search and seizure cases "is calculated to prevent, not

to repair. Its purpose is to deter * * * by removing the incentive to disregard" the commands of the Fourth Amendment (*id.* at 217). This theme was reiterated in *Desist,* where the court reasoned (394 U.S. at 253):

> Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date.

As we have contended in *Elkanich* v. *United States,* No. 82, this Term, the same rationale that militated against the retroactivity of *Katz,* argues persuasively that the same result be accorded to *Chimel.* Petitioner recognizes that *Desist* is squarely in point and that the decision in that case would have to be overruled for him to prevail here (Pet. Br. 6). Petitioner offers no better or different reasons[9] for such a holding than are suggested—and, we submit, are effectively refuted by our brief—in *Elkanich.*

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[9] It is of course, true that the number of cases potentially affected by applying a new rule only to cases on direct review, as distinguished from applying it in a wholly retroactive fashion, is less. But that consideration did not prevent the Court from ruling as it did in *Desist;* nor should it do so here. As in *Desist*, attention should be focused, in Fourth Amendment cases involving retroactivity questions, primarily on the *purpose* of the new rule. As the Court stated in *Desist* (394 U.S. at 249): "Foremost among these factors is the purpose to be served by the new constitutional rule. This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule." Such an emphasis on the purpose factor leads to the same result—non-retroactivity—whether a case on direct or on collateral review is involved, as the Court in *Desist* concluded.

In sum, in determining whether new rules shall b applied retroactively or not, this Court has consist ently, and, we believe, reasonably, held that where decision changes the principles governing action b law enforcement officers, the law in effect at the tim the officer acted is ordinarily controlling. In *Desist* for example, the Court focused on the operative con duct and held that the *Katz* rule applies only t searches and seizures conducted after the date of th *Katz* opinion. The Court emphasized that the exclu sion of evidence seized prior to the date of the *Katz* de cision "would overturn convictions based on fair reli ance upon pre-*Katz* decisions, and would not serve t deter similar searches and seizures in the future" (394 U.S. at 253).

As petitioner acknowledges, the same considera tions which led the Court to hold *Katz* prospective only are persuasive in this case. We submit that the principles stated in *Desist* should be reaffirmed. In deed, once a determination has been made that a deci sion is prospective only, to distinguish between col lateral and direct review would only increase the number of "chance beneficiaries"[10] of a particular decision without in any way aiding the enforcement of Fourth Amendment rights. As this Court concluded in *Stovall,* even though a degree of inequity "argu ably results from according the benefit of a new rule

[10] In the past, some members of this Court have expressed concern that an approach of complete nonretroactivity gives rise to "chance beneficiaries" of new rules. See *Desist* v. *United States*, 395 U.S. 244 (dissenting opinions of Douglas J., and Harlan J.); *Linkletter* v. *Walker*, 381 U.S. 618 (dissenting opinion of Black, J.).

to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue * * *, the fact that the parties involved are chance beneficiaries [is] an insignificant cost for adherence to sound principles of decision-making" (388 U.S. at 301). Cf., however, *Allen* v. *State Board of Elections,* 393 U.S. 544, 572, and *Cipriano* v. *City of Houma,* 395 U.S. 701, 706, where the Court applied its holdings in a wholly prospective fashion so as not to affect even the parties to the particular litigation, insofar as past action was concerned; admittedly, those cases did not arise in the criminal context, but *Cipriano,* as distinguished from *Allen,* did involve a constitutional holding.

Nor, finally, do we find persuasive petitioner's argument that the Court should not lend a hand to the illegality by denying relief to those who come before it on direct appeal. With all due respect to Justice Peters' dissent in *People* v. *Edwards,* 80 Cal. Rptr. 633, 640, and the legitimate concern it represents, we can discern no reason why the Court lends a hand to illegality when it denies effect to a recent decision on direct review any more than when it proceeds similarly in a case on collateral attack. In either case, we submit, the only relevant criterion is whether, after balancing competing arguments and considering the pertinent factors delineated by this Court in *Linkletter, Stovall, Desist,* and like cases—purpose, reliance, and effect—a particular decision is to be applied retroactively or prospectively. If it is to be denied

retroactive effect, then an evenhanded treatment requires that relief be denied in all cases where the law enforcement action was justifiably regarded as legal when conducted. Accordingly, it is not relevant to inquire about the stage at which the proceedings happen to be. Indeed, petitioner admits that it is "virtually impossible to distinguish the *Desist* case from the instant case" (Pet. Br. 8). We submit that he has presented no sound reason to depart from the approach there taken.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the court of appeals should be affirmed.

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JUNE 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970